No. 20155

United States
COURT OF APPEALS
for the Ninth Circuit

EDITH L. HIGLEY, Widow of Darold B. Higley, Deceased,

Appellant,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, W. J. JONES & SON, INC., and NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO.,

Appellees.

Appeal from the United States District Court for the District of Oregon

APPELLANT'S REPLY BRIEF

POZZI, LEVIN & WILSON,
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The briefs filed herein by appellees completely fail to deal either with the issues raised or the cases cited by claimant. Claimant's position may be without merit, but nothing said by the opposing parties leads to that conclusion, because neither brief condescends to discuss claimant's position. The single exception to this state-

ment is the "entire agreement" of the employer and carrier with one of claimant's two major premises: that the finding regarding the strenuousness of the work was irrelevant.

For authority, claimant relied principally upon the cases of *Hancock* v. *Einbinder,* 310 F.2d 872 (C.A. D. C., 1962) and *Vinson* v. *Einbinder,* 307 F.2d 387 (C.A. D. C., 1962). The inconvenience of these cases to appellees is circumvented by the simple expedient of ignoring them.

Admitting that the finding in question is totally irrelevant (Br. 7-8), the employer argues that it can be ignored because "every phrase in a judicial opinion should not be subject to withdrawal from context for hypercritical scrutiny . . ." It is seldom that so much error is compressed in a portion of a sentence. The phrase was not withdrawn from context; it is not from a judicial, but an administrative, proceeding; and it was not part of an opinion, but a finding of fact (R. 6). It is precisely because a court, reviewing an administrative decision, is entitled to know what facts were found, that this type of detail must be set forth in a compensation order. When an administrative agency makes what may be a crucial finding, which is legally irrelevant and factually erroneous, the claimant whose rights are thereby adjudicated, as well as the court that must review the decision, is entitled to some explanation.

The deputy commissioner's brief furnishes no explanation whatever. Like the employer's brief, it fails to suggest that the finding is supported by evidence.

Unlike the employer, the deputy commissioner also neglects to discuss whether the finding was relevant.

The deputy commissioner's brief does assert that he was warranted in concluding that claimant had not sustained the burden of establishing her claim (Br. 21). Claimant's position—which the brief ignores—is that it is impossible to determine from the deputy commissioner's finding what he considered that burden to involve. Did he believe that it was necessary for claimant to establish that the work in which decedent was engaged was more strenuous than normal? If not, why did he make such a finding, particularly when totally unsupported by evidence? This is the entire basis of claimant's appeal, but is not deemed by either appellee to be worthy of discussion.

The deputy commissioner's brief does make a few statements which, while of no particular significance, are so far out of line that claimant begs the Court's indulgence for noting them. Thus, when the error of government counsel in failing to file the testimony of Dr. Rose with the rest of the record was discovered, it was stipulated that Dr. Rose's testimony was cumulative in relation to the issues arising on review (R. 96). The statement in the deputy commissioner's brief that this stipulation "corroborates" the evidence that the employee died as a result of pre-existing disease and not as a result of his work (Br. 15-16) is wholly inappropriate and illegitimate. It was stipulated that Dr. Rose's testimony adds nothing for the purpose of this appeal.

The brief also makes the assertion that claimant's

simple statement that Dr. Buck, the pathologist, was not asked to express an opinion, was made by claimant "in a way intended to represent accusation of the employer's counsel . . . " (Br. 20). No one has a higher regard for the character and competence of employer's counsel than counsel for claimant. If there is anything in the factual statement that "Dr. Buck was not asked to express an opinion as to whether or not the death was work-related," that accuses or reflects adversely upon anybody, it is beyond our powers to discover.

Since the filing of claimant's brief, the Court of Appeals for the District of Columbia has decided *Howell* v. *Einbinder,* 350 F.2d 442 (C.A. D.C., 1965), a case so precisely in point as to be totally indistinguishable.

In *Howell,* as here, the workman suffered an unknown injury before the day in question. In both cases, he then worked strenuously. (Howell, unlike Higley, did not, however, die on the job.)

As in this case, the deputy commissioner found that decedent's work in no way aggravated or hastened his death. He specifically found more convincing the medical testimony, similar to that in this case, that the aneurysm took its natural course and was wholly unaffected by decedent's work. As here, there was contrary medical testimony. Also, as here, the doctors who testified that the work did not have any effect on the condition admitted that, had they known of the condition, they would not have permitted decedent to work.

As in this case, the deputy commissioner made a number of findings of limited relevance and dubious ac-

curacy, regarding decedent's lack of complaint that the work was too hard for him or made his head worse.

The court held that, "The reliance by the deputy commissioner upon these findings . . . casts grave doubt upon the substantiality of the evidence on the record as a whole to support the ultimate inference of non-aggravation. These findings are a completely inadequate and insubstantial basis for such inference."

The identical statement may be made of the finding regarding strenuousness in this case.

The court, having previously noted that the "substantial evidence" rule does not "require acceptance of an ultimate finding or inference if the decision discloses that it was reached in a manner which cannot be accepted as valid," went on to hold:

> "And when we consider the importance the Deputy Commissioner appears to have accorded the numerous findings of absence of specific complaint by decedent and his wife that his condition was related to his work, when neither knew what his condition was, we must conclude that the decision of the Deputy Commissioner was influenced by these inconsequential matters. Finally, the wording of the decision suggests that the Deputy Commissioner did not take into consideration the presumptions favorable to the employee or his dependents.
>
> "The features of the decision to which we have referred, while not leading us to direct an award of benefits to appellants . . ., do require that the order upon appeal be reversed, with directions that the decision of the Deputy Commissioner be set aside and the case remanded for reconsideration,

without prejudice to the reception of additional evidence if deemed desirable."

In summary, claimant submits that her position is either entirely conceded or totally unanswered. Nobody has suggested that the finding made was correct. Nobody has suggested why it was made. Nobody has attempted to discuss or distinguish the cases on which claimant relied. It is incumbent upon this Court, at the least, to remand the proceeding for an explanation by the deputy commissioner, and the application of the correct standard.

Respectfully submitted,

POZZI, LEVIN & WILSON
PHILIP A. LEVIN
Proctors for Appellants